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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

No. 569

MUNICIPAL ACCEPTANCE CORPORATION, A CORPORATION, *Petitioner,*

v.

ERNEST K. JAMES, STATE TAX COMMISSIONER FOR THE STATE OF WEST VIRGINIA, UNITED STATES OF AMERICA, AND ROY F. YOKE, COLLECTOR OF INTERNAL REVENUE FOR THE UNITED STATES OF AMERICA, IN THE STATE OF WEST VIRGINIA, *Respondents.*

BRIEF IN BEHALF OF ERNEST K. JAMES, RESPONDENT, IN OPPOSITION TO GRANTING WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF THE STATE OF WEST VIRGINIA

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STATEMENT

Complaint is made by petitioner (P. 5-6) that the decision of the Supreme Court of Appeals of West Virginia (R. 212-219) to the effect that all rights and interests of the parties to this cause were adjudicated by a final decree pronounced by the Circuit Court of Raleigh

County, West Virginia, on March 10, 1939, from which decree no appeal was taken, and could not then be taken because of the lapse of time, violates the due process clause, Amendment XIV, Section 1 of the Federal Constitution, and impairs the obligation of the conditional sales contracts of petitioner, in violation of Article I, Section 10 of the Constitution of the United States. It will be observed that the Supreme Court of Appeals for West Virginia expressly held that the decree of March 10, 1939, pronounced by the Circuit Court of Raleigh County, was a final decree from which an appeal could have been prosecuted by petitioner (R. 218); that no appeal was taken, and that because of the lapse of time no appeal could then be had. The Court said (R. 218):

> "* * * This decree was an appealable one inasmuch as it adjudicated the principles of the cause. Bank v. Bank of Charles Town, supra. No appeal was taken from that decree and it must stand as the final judgment of the court upon all subject matters with which it purported to deal. It provided for the payment of the expenses of the receivership and fixed the priorities of the several tax liens, and the Court cannot at this date disturb the decree so entered."

It is respectfully submitted, therefore, that inasmuch as no attempt was made to prosecute an appeal from that decree, petitioner may now be deemed in law to have forfeited all rights and interests which may have otherwise existed. Failing to avail itself of the right of appeal, can petitioner now be heard to complain that the decree finally adjudicating the principles of the cause does violence to any provision of the Federal Constitution? Respondent did not appeal from the decree of March 10, 1939, for the reason that it was considered favorable to his position in the premises.

ARGUMENT

No Federal Questions Presented

Petitioner alleges that the judgment of the Supreme Court of Appeals of West Virginia (R. 212-219), deciding that its rights were fully adjudicated by the decree of the Circuit Court of Raleigh County pronounced on March 10, 1939, impairs the obligation of the conditional sales contracts, in violation of Section 10, Article I of the Federal Constitution, and deprives it of property without due process of law, within the meaning of Section 1 of the Fourteenth Amendment to the Federal Constitution (P. 1-2). It must be apparent, we submit, that the allegation that the interpretation placed upon the decree of March 10, 1939, by the Supreme Court of Appeals of West Virginia in the principal case, and the holding of the Court in the case of *Moran* v. *Leccony Smokeless Coal Company*, 10 S. E. (2d) 578 (1940), with respect to priority of liens involved in the principal case, impairs the obligation of the conditional sales contracts of the petitioner, in violation of Section 10, Article I of the Constitution of the United States, and amounts to a denial of due process under Section 1 of the Fourteenth Amendment of the Constitution, is fictitious and frivolous, and wholly without substance or merit. It presents no substantial Federal question. We understand that it is settled under numerous decisions of this Court that it will decline jurisdiction although the constitutionality of a State law or other Federal question is involved, where it appears such question is not substantial *(Zucht* v. *King*, 260 U. S. 174), or "is of such an unsubstantial nature as to cause it to be devoid of all merit, and therefore frivolous" *(Deming* v. *Carlisle Packing Co.*, 226 U. S. 102), and that the assertion of a Federal right must not be wholly without foundation, but "must at least have fair color of support" *(Parker* v. *McLane*, 237 U. S. 469). Other decisions in which juris-

diction has been denied or appeals dismissed on similar grounds include: *Wabash Railroad Co.* v. *Flannigan,* 192 U. S. 29; *United States Fidelity & Guaranty Co.* v. *Oklahoma,* 250 U. S. 111; *Ennis Water Works* v. *City of Ennis,* 233 U. S. 652.

The State Supreme Court of Appeals, in interpreting the decree of March 10, 1939 (R. 212-219), holding, in effect, that the lien of the State for its taxes was prior to such property right of petitioners under the conditional sales contracts, passed upon a Federal question theretofore expressly determined by this Court, and in a manner wholly in accord with the decisions of this Court. In the case of *Barwise* v. *Sheppard,* 299 U. S. 33, this Court considered a statute of the State of Texas imposing a tax on the production of oil and gas. Appellants, lessors of lands from which oil was produced, contended that that part of the act imposing a tax upon them, since enacted subsequent to the date of the lease, violated the contract clause of the Federal Constitution, and the due process clause of the Fourteenth Amendment. Holding the statute valid, the Court observed:

> "* * * we are of opinion that it is not an arbitrary fiat and does not infringe the due process of law clause of the Fourteenth Amendment." (P. 39)

In disposing of the contention with respect to the contract clause, this Court said:

> "* * * the lease was made in subordination to the power of the State to tax the production of oil and to apportion the tax between the lessors and the lessee. The taxing act does not purport to reach or affect any term of the lease. Plainly no stipulation in the lease can be of any avail as against the power of the State to impose the tax, prescribe who shall be under a duty to the State to pay it, and fix the time and mode of payment.

> And this is true even though it be assumed to be admissible for the lessors and lessee to stipulate as to who, as between themselves, shall ultimately bear the tax. These views are but a reiteration and application of what repeatedly has been held in respect of contracts and their subordination to the taxing power." (P. 40)

The decisions of this Court in accord therewith are numerous: *Kehrer* v. *Stewart,* 197 U. S. 60; *Lake Superior Consolidated Iron Mines* v. *Lord,* 271 U. S. 577; *Clement National Bank* v. *Vermont,* 231 U. S. 120; *Henderson Bridge Co.* v. *Henderson,* 173 U. S. 592; *Moffitt* v. *Kelly,* 218 U. S. 400.

It is respectfully submitted that the decision of the Supreme Court of Appeals of West Virginia of which complaint is made is in strict accord with the decisions of this Court upon the same or similar principles, and must, therefore, stand.

CONCLUSION

None of the grounds referred to in Section 5 of Rule 38 of this Court, nor under Judicial Code, subdivision "b" of Section 237, amending U. S. C. A., Title 28, subdivision "b" of Section 344, for awarding a writ of certiorari, are present here. It does not appear from the record presented to this Court that a State Court has decided a Federal question of substance, not theretofore determined by this Court, or has decided in a way probably not in accord with applicable decisions of this Court, or that any title, right, privilege or immunity of petitioner under the Constitution is involved. The contention that the decision of the Supreme Court of Appeals of West Virginia to the effect that the rights of petitioner were finally adjudicated by the decree of the Circuit Court of Raleigh County, pronounced on March 10, 1939, and as interpreted

by the State Supreme Court of Appeals in the case of *Moran* v. *Leccony Smokeless Coal Co.*, 10 S. E. (2d) 578 (1940), impairs the obligation of the conditional sales contract in violation of Section 10, Article I of the Federal Constitution, and the due process clause of the Fourteenth Amendment to that Constitution, is utterly unsubstantial and frivolous, as disclosed by the record and the decisions of this Court. The record discloses no Federal question. On the other hand, the record demonstrates, we think, the soundness of the decisions of the State Supreme Court of Appeals, of which complaint is made.

Wherefore, it is submitted that the writ of certiorari as prayed for should be denied by this Court.

Respectfully submitted,

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State Tax Commissioner for the State of West Virginia,

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